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In the Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents' arguments are built on a fundamental misinterpretation of the regulation at issue in this case. Respondents assert that the regulation forbids all aliens from working pending determination of deportability, even though the text of the regulation and the notice of promulgation provide that the "no work" condition applies only to aliens who are not authorized to work. Respondents go to challenge the validity of their hypothetical regulation banning authorized employment based on the legislative history of a provision unrelated to the one on which the Attorney General relies for his authority. They seek additional support from judicial decisions that address the circumstances under which an alien may be held without bond, rather than what conditions may be imposed in a bond. Respondents' legal argument is, on a fair reading of the regulation, largely beside the point.

On one point, however, respondents' argument is on target. They now appear to agree with us that the court of appeals erred in concluding, Pet. App. 37a-54a, that

the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which imposes sanctions on employers for hiring aliens who are not authorized to work, 8 U.S.C. 1324a, restricts the authority conferred on the Attorney General in 1952 to impose conditions on release bonds, 8 U.S.C. 1252(a)(1). Respondents reject "post-1952 legislative statements" because "[l]egislative intent must primarily, if not exclusively, be judged as of the time of the statute's enactment." Resp. Br. 21. Respondents thus seem to reject, Resp. Br. 29, one of the key rationales underlying the court of appeals' decision. This Court should also conclude that Congress's enactment of additional measures to combat unauthorized employment in 1986 did not circumscribe the Attorney General's preexisting authority to promulgate a bond condition forbidding unauthorized employment.

1. Respondents assert that the regulation at issue in this case forbids all aliens from working as a condition of their release on bond pending determination of deportability. Resp. Br. 1-2. That is not true.

a. After an alien is arrested pursuant to an order to show cause, 8 C.F.R. 242.1, the district director (or his designee) determines, pursuant to 8 C.F.R. 103.6, Pet. App. 123a, whether the alien is authorized to work. If the alien is authorized to work, the district director releases the alien on bond without any condition requiring him to refrain from work. That is because the regulation only imposes—as its caption plainly states—a "[c]ondition against *unauthorized* employment." *Ibid.* (emphasis added). If the alien is not authorized to work, however, the district director releases the alien on bond with the condition "Employment not authorized" or "No employment authorized." Resp. Br. 6 n.4.

Respondents infer from the wording of the bond condition, and from the body of the regulation (which refers to "[a] condition barring employment," Pet. App. 123a) that the regulation bars all employment, rather than just unauthorized employment. Resp. Br. 1-2. This reasoning ignores the fact that the district director imposes the

"no work" condition only *after* he determines that the alien is in fact not authorized to work. That determination is implicit in the condition "Employment not authorized." Resp. Br. 6 n.4. It is assumed in the notice of promulgation (which states that "permanent resident aliens are *not* affected by these release conditions" because "the permanent resident alien has the right to work in the United States," 48 Fed. Reg. 51,143 (1983), Pet. App. 142a-143a (emphasis added)). And it is compelled by the caption of the regulation, which requires district directors to impose only a "[c]ondition against *unauthorized* employment." 8 C.F.R. 103.6, Pet. App. 23 n.14. Tellingly, respondents do not even mention—let alone explain the significance of—the caption of the regulation. The agency's reading of its regulation is entitled to deference, see Gov't Br. 23 n.14, especially where, as here, the regulation has been held invalid before the agency has had a chance to implement it.

b. Respondents seem to recognize that the district director must "determine whether the employment is indeed unauthorized," for they complain that there are "no standards (or hearing of any type)" to make that determination. Resp. Br. 1. This new complaint is also untrue. As we explained in our opening brief, an alien's authorization to work is a function of his immigration status (the statuses authorizing an alien to work are set forth at 8 C.F.R. 274a.12(a) and (b), Pet. App. 127a-132a), and that status can be readily determined by available documents in virtually every case, Gov't Br. 24-25 n.16. Respondents do not contest the legal standard by which work authorization is determined or the accuracy with which it can be made.[1]

Since the district director's determination whether an alien is authorized to work (and thus whether the bond must contain a "no work" condition) is straightforward,

[1] Respondents do criticize the procedure by which the district director determines whether an alien has worked in violation of the bond condition. We address that concern in point 5, *infra*.

a formal adversarial hearing is not necessary. Nevertheless, respondents' remark that "no hearing" is available, Resp. Br. 1, suggests that administrative and judicial review is unavailable. That is not true. The district director must notify the alien that he may apply to an immigration judge for "modification of the conditions of release."[2] 8 C.F.R. 242.2(c)(2). The alien may apply either while he is being detained or after accepting the bond condition and being released, "within seven (7) days after the date of such release." 8 C.F.R. 242.2(d). In connection with his application, the alien has a right to appear through counsel and must be notified of free legal services programs. *Ibid.* The immigration judge must notify the parties of his decision "and the parties shall be promptly informed orally or in writing as the reasons for the Judge's decision."[3] *Ibid.* "The alien and the Service may appeal to the Board of Immigration Appeals from any such determination." *Ibid.*; 8 C.F.R. 3.1(b)(7). If the BIA upholds the imposition of the bond condition, the alien may seek relief in the United States District Court. 8 U.S.C. 1329.

The regulation thus requires the district director to impose a "no work" bond condition only after he determines, subject to administrative and judicial review, that an alien is not authorized to work. Thus, contrary to

[2] Immigration judges may conduct bond redetermination hearings by telephone. 12/6/83 Tr. 32. Immigration judges conducted 15,736 bond redetermination hearings in fiscal year 1990. Executive Office of Immigration Review, *Statistical Summary* n.p. (Nov. 1, 1990).

[3] If the alien does not receive the prompt decision required by regulation, he may file a petition for a writ of habeas corpus under 8 U.S.C. 1252(a)(1), which gives the district court "authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability" if "the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability."

respondents' contention, Br. 8, 19-20, the bond condition does not rest on a presumption of deportability. It rests on a determination—entirely separate from the determination of deportability—that an alien is not authorized to work. See 8 C.F.R. 242.2(d) (an application to remove a bond condition "shall be separate and apart from any deportation hearing or proceeding under this part, and shall form no part of such hearing or proceeding"); cf. *Bell* v. *Wolfish*, 441 U.S. 520, 533 (1979) ("The presumption of innocence * * * has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.").

As this case comes to the Court—on a facial challenge to the regulation—it must be assumed that the determination whether the alien is authorized to work can be made reliably and reviewed promptly. Cf. *United States* v. *Salerno*, 481 U.S. 739, 751 (1987).[4] The only question properly before the Court is whether the Attorney General has authority to impose a condition barring unauthorized employment pending determination of deportability.

2. Section 1252(a)(1) of the Immigration and Nationality Act of 1952 authorizes the Attorney General, pending final determination of deportability, to release an alien on bond "containing such conditions as the Attorney General may prescribe." 8 U.S.C. 1252(a)(1). The clause describing the permissible conditions—"as the Attorney General may prescribe"—contains no qualifying language that might restrict permissible conditions to those serving some immigration policies but not others. To the contrary, Section 1103(a) of the Act, enacted contemporaneously with Section 1252(a)(1), provides that "[t]he Attorney General * * * shall establish * * *

[4] Respondents' contrary assumption rests on the testimony of two immigration lawyers at the preliminary injunction hearing. Resp. Br. 42. Their testimony formed no part of the district court's decision to enter the injunction. That decision was instead based on the court's *sua sponte* grant of summary judgment on facial, statutory grounds. Pet. App. 82a-83a.

such forms of bond * * * as he deems necessary *for carrying out his authority under the provisions of this chapter.*" 8 U.S.C. 1103(a) (emphasis added). "[T]his chapter" refers to "Chapter 12—Immigration and Nationality," which includes the entire Immigration and Nationality Act. Respondents nonetheless insist that the Attorney General's authority is limited to ensuring "availability for hearings, the national security or public safety." Resp. Br. 7. In the face of this broad grant of bond-setting authority, however, respondents must find some unmistakable indication of such an intent in order to justify the lower court's injunction. None exists.

a. The Immigration Act of 1917, 8 U.S.C. 156 (1946), permitted release on bond "conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." As respondents point out, "[t]he statute was clearly concerned with appearance for proceedings." Resp. Br. 22; see *id.* at 9. But Congress amended the 1917 Act in 1950 precisely because it wanted to "change[]" this provision. H.R. Rep. No. 3112, 81st Cong., 2d Sess. 59 (1950). Accordingly, Section 23 of the Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 1011, provided that the availability of the alien for hearings shall be only one, or "among," the conditions of any release bond. App., *infra*, 11a. Congress "follow[ed] the procedure established by section 23 of the Subversive Activities Control Act of 1950" when it passed Section 1252(a)(1) of the Immigration and Nationality Act in 1952. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 29 (1952).

Congress's expansion of permissible bond conditions beyond those related to appearance was sensible; otherwise, the Attorney General would be forced to release aliens who present a danger to public safety if he were confident they would appear for hearings. Cf. *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) (upholding preventive

detention because "[o]therwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings"). Even respondents recognize the authority to impose bond conditions to protect the "public safety." Resp. Br. 7, 12. And the court of appeals likewise rejected the argument that bond conditions "must have the *sole* purpose of ensuring appearance at deportation hearings." Pet. App. 22a-23a. Once respondents concede the authority to impose bond conditions for purposes of the "public safety," there is no textual basis in the clause "containing such conditions as the Attorney General may prescribe," 8 U.S.C. 1252(a)(1), to limit permissible release conditions to any particular subset of the policies of the immigration laws.

b. Respondents contend that the Attorney General may prescribe bond conditions to further only some immigration policies because H.R. 10—the progenitor of Section 1252(a)(1)—would have authorized detention only for a particular purpose. Resp. Br. 9-10, 22-25.

This Court noted in *Carlson* v. *Landon*, 342 U.S. at 538-539, that H.R. 10 was the progenitor of Section 23 of the Subversive Activities Control Act of 1950, and thus of Section 1252(a)(1) of the Immigration and Nationality Act of 1952. See 96 Cong. Rec. 16,602 (1950) (indefinitely postponing consideration of H.R. 10 because "[i]t is part of a measure which already has been passed"). Congress's intention regarding the Attorney General's authority under H.R. 10 is therefore highly suggestive of his authority under Section 1252(a)(1).

Relying on floor statements, respondents assert that H.R. 10 would have authorized detention only of aliens subject to a final order of deportation and then only "in aid of deportation." Resp. Br. 9-10, 22-25. The floor statements on which respondents rely, however, related to the Attorney General's authority to detain criminal and subversive aliens without bond under subsection (c) of H.R. 10, not to his authority to impose bond conditions under subsection (a). See 96 Cong. Rec. 10,449-10,460 (1950); see also App., *infra*, 1a-8a (reprinting

H.R. 10).[5] Subsection (c) would have authorized the Attorney General to detain indefinitely any criminal or subversive alien "pending eventual deportation." App., *infra*, 6a. The bill's sponsors thought that aliens subject to deportation would have a greater incentive to help arrange their departure if they faced indefinite detention (rather than release into society, as was the case under the law at that time). 96 Cong Rec. 10,453 (1950) (remarks of Rep. Keating). Given the wording of subsection (c) and the particular purpose it was designed to serve, it is no revelation that Congress intended it to apply only to certain deportable aliens and then only to facilitate their deportation. At the same time, the limited scope and purpose of the proposed indefinite detention authority under subsection (c) says nothing about the intended scope and purpose of bond conditions under subsection (a).

The only explanation of the authority to set bond conditions under subsection (a) appears in the committee reports. Both reports state: "The bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit to include." S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950); H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949). "The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien."[6] *Ibid.*; see Gov't Br. 19-20. The legislative history of H.R. 10 provides no basis for limiting the purposes of bond conditions under 8 U.S.C. 1252(a)(1).

[5] See, *e.g.*, 96 Cong. Rec. 10,449 (remarks of Rep. Walter) ("[T]he detention provisions of this bill apply only to those cases where deportation orders have been issued for the deportation of prostitutes and procurers, of dealers in narcotics, of those criminals who have served over a year and a day in the penitentiary, and subversives."); *id.* at 10,456 (remarks of Rep. Hobbs). Representative Celler noted that "[t]he authors of this bill seek to avoid the taint or charge of imprisonment without trial by saying that the detention shall not be at hard labor." *Id.* at 10,450. That reference, like the rest of the floor debate, can only refer to subsection (c) of H.R. 10, which would have authorized detention, "though not at hard labor, pending eventual deportation." App., *infra*, 6a.

c. Respondents contend that Section 23 of the Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 1011, limited bond conditions to those ensuring appearance for hearings and protecting the public. Resp. Br. 26-27. The text of Section 23 does not bear that construction.

Section 23 required, as a mandatory condition of bond, that the alien "shall be produced" for hearings. App., *infra*, 11a. But it also provided that that condition was only one, or "among," the conditions of any release bond. *Ibid.* As explained in point 2.a., *supra*, Congress enacted Section 23 specifically to "change[]" the 1917 Immigration Act, which did limit bond conditions to those related to ensuring appearance. In addition, the legislative history makes clear that Section 23 "incorporate[d] the principal provisions of H.R. 10." S. Rep. No. 2369, 81st Cong., 2d Sess. 14 (1950). As demonstrated in point 2.b., *supra*, H.R. 10 would have given the Attorney General "full discretion" and "untrammeled authority" to impose conditions in addition to a condition that the alien be produced for deportation proceedings.

If bond conditions extend beyond those related to ensuring appearance—and respondents concede that this Court in *Carlson* v. *Landon*, 342 U.S. at 544, construed Section 23 to authorize "conditions of bond relating to the national security," Resp. Br. 27—nothing in the text

[6] This Court said in *Carlson* v. *Landon*, 342 U.S. at 543, that "the Attorney General is not left with untrammeled discretion as to bail." The "untrammeled discretion" that this Court rejected was the notion that "the Attorney General is left without standards to determine when to admit to bail and when to detain" alien communists—an alleged unconstitutional delegation of legislative power. 342 U.S. at 542. Contrary to respondent's contention, Resp. Br. 13, 24, the Court in that passage was *not* referring to the committee reports on H.R. 10. Cf. 342 U.S. at 539 n.32.

of that Section prevents the Attorney General from imposing conditions furthering other policies of the immigration laws as well.[7]

d. Respondents contend that the Attorney General's authority under Section 1252(a)(1) to impose "such conditions as [he] may prescribe" is limited by comparison to the grants of authority in Sections 1252(c) and 1252(d). Resp. Br. 9, 20-21.

Contrary to respondents' premise, the authority to prescribe bond conditions in Section 1252(c), which concerns aliens subject to a final order of deportation, is identical to that in Section 1252(a)(1). Both authorize the Attorney General to release aliens on bond "containing such conditions as the Attorney General may prescribe." It is true that Section 1252(c) goes on to authorize release without bond "on such other condition as the Attorney General may prescribe." But here, too, the breadth of permissible condition—"as the Attorney General may prescribe"—is identically broad. Section 1252(c) provides no basis for reading Section 1252(a)(1) narrowly.

In contrast to the Attorney General's authority under Section 1252(a)(1) and 1252(c), his authority under 8 U.S.C. 1252(d) to supervise an alien who cannot be deported is properly limited to ensuring availability for departure. See *United States* v. *Witkovich*, 353 U.S. 194, 201 (1957). This Court placed a limiting construction on Section 1252(d) because such supervision can continue indefinitely and might deprive aliens of existing First Amendment rights. 353 U.S. at 201. Although respondents

[7] Respondents try to distinguish the alien communists whose detention this Court upheld in *Carlson*, 342 U.S. at 526-547, from other aliens on the ground the "Congress made Communists excludable and deportable." Resp. Br. 27. But aliens seeking to enter the United States in order to work without authorization were made similarly excludable, 8 U.S.C. 1182(a)(14), and deportable, 8 U.S.C. 1251(a)(1), by the Immigration and Nationality Act of 1952. Employment-related bond conditions are thus entirely consistent with Section 23 and this Court's decision in *Carlson*. See point 3, *infra*.

continue to cite *Witkovich*, Resp. Br. 13-14, they do not address the obvious differences between the two subsections, or the lack of language in Section 1252(a)(1) suggesting a limiting construction similar to the one placed by the Court on Section 1252(d). See Gov't Br. 17 & n.9.

e. As noted at the outset of this brief, respondents now concede, with specific reference to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, that "later enactments do not explain what Congress had in mind in 1952." Resp. Br. 29. Although respondents note, Resp. Br. 11, 32, that Congress declined in IRCA to impose sanctions on employees who work without authorization, they do not dispute that IRCA left intact the Attorney General's preexisting authority and that the employee sanctions Congress rejected differed from the detention that would result from violation of the "no work" bond condition—detention that is limited to the duration of deportation proceedings and occurs only if the alien violates the bond condition. See Gov't Br. 17-18 & n.11. The only significance of IRCA to this case is its demonstration of Congress's continued commitment to protecting American labor from competition with aliens who are not authorized to work in this country.

3. Respondents do not directly respond to our contention that the prevention of unauthorized employment is a core purpose of the Immigration and Nationality Act. See Gov't Br. 22-23. Instead, they suggest that a bond condition forbidding unauthorized employment is not consistent with immigration policy because an alien does not commit a crime by working without authorization and because certain statutory benefits are available despite prior unauthorized employment. Resp. Br. 8, 16-18.

a. It does not follow from respondents' observation, however, that Congress intended to condone unauthorized employment. That Congress did not impose every possible sanction to deter unauthorized employment does not mean that unauthorized employment is permissible. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984) (ex-

plaining that "[a] primary purpose in restricting immigration is to preserve jobs for American workers," even though "Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally").[8]

Respondents confuse means and ends. Rather than make it a crime for aliens to work without authorization, Congress barred the admission of such aliens in the first place. Thus, Congress ordered the exclusion of aliens seeking to enter this country to work without authorization, 8 U.S.C. 1182(a)(14), and ordered the deportation of such aliens who enter in violation of that condition, 8 U.S.C. 1251(a)(1).[9] As the notice promulga-

[8] Two examples will illustrate the point. Respondents contend that, for an alien to adjust his status under the amnesty provisions of IRCA, he must demonstrate a history of unauthorized employment. Resp. Br. 11, 17-18, 30. It is true that an applicant for legalization must demonstrate a history of employment to prove that he will not be a public charge, 8 U.S.C. 1255a(d)(2)(B)(iii), and since the alien was not authorized to work, the law effectively requires a history of unauthorized employment to qualify for amnesty. It is in the nature of an amnesty, however, that the conduct forgiven is unlawful. That Congress was willing to forgive past unauthorized employment does not indicate that it intended to condone such conduct in the future.

Respondents also contend that the bond regulation is inconsistent with IRCA because it fails to "grandfather" aliens who are exempt from employer sanctions. Resp. Br. 33. Congress applied the employer sanctions prospectively, to new hires, in order to "be the least disruptive to the American businessman and * * * minimize the possibility of employment discrimination." H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 56 (1986). That purpose does not reflect a congressional intention to "grandfather" alien employees already working illegally.

[9] Quoting a passage from a committee report, respondents suggest that 8 U.S.C. 1182(a)(14) was the only measure Congress permitted to prevent unauthorized employment. Resp. Br. 10, 28; see H.R. Rep. No. 1365, 82d Cong., 2d Sess 51 (1952) ("It is the opinion of the committee that this provision will adequately provide for the protection of American labor against an influx of aliens * * *."). The committee's opinion as to the efficacy of Section 1182(a)(14), however, presupposes its effective enforcement. Without a condition barring unauthorized employment pending determination of deportability, "the alien could simply continue his employment with impunity until a deportation hearing was scheduled and through the appeal process." 48 Fed. Reg. 51,142 (1983), Pet. App. 140a.

ing the regulation put it: "Such unauthorized employment is a continuing violation of the immigration laws" and contravenes "a basic purpose of the immigration laws"—"to protect against the displacement of workers in the United States." 48 Fed. Reg. 51,142-51,143 (1983), Pet. App. 139a-140a. The regulation promulgated by the Attorney General simply mirrors the exclusion in 8 U.S.C. 1182(a)(14): aliens may be released into the population at large only on the condition that they not work without authorization.

Congress's decision to reserve employment opportunities for American citizens and legal residents—by denying them to aliens not authorized to work—is a policy choice that governs regardless of the good purposes to which the fruits of such employment would be put. It applies even if employment is necessary to support the alien or his family in the United States.[10]

b. Respondents fault our citation of IRCA to show Congress's continued commitment to prevention of unauthorized employment, because Congress enacted IRCA after it passed the Immigration and Nationality Act of 1952, which authorized the Attorney General to prescribe bond conditions. Resp. Br. 21. As previously noted, the

[10] Or to pay his lawyer. Although an alien has a statutory right to counsel in deportation proceedings, that right is "at no expense to the Government." 8 U.S.C. 1362. Amici American Bar Association asserts that without employment to retain counsel, individuals might fail to press colorable claims to citizenship or political asylum. ABA Br. 5 n.2, 6, 19-20. That risk is mitigated by provisions that the regulation does not apply to "[i]ndividuals maintaining a colorable claim to U.S. Citizenship," Gov't Br. 25 n.16 (quoting INS Operating Instruction), or to aliens who have filed nonfrivolous asylum applications, 8 C.F.R. 274a.12(c)(8), Pet. App. 134a; 48 Fed. Reg. 51,143 (1983), Pet. App. 143a. Others may nevertheless seek discretionary work authorization or help from family, friends, or charity to pay their lawyer. Alternatively, they may request pro bono legal assistance.

premise of respondents' argument—that "post-1952 legislative statements * * * should be given little weight," Resp. Br. 21—disposes of a major portion of the analysis on which the court of appeals based its ruling. Pet. App. 37a-48a. At the same time, it does nothing to undercut our contention that unauthorized employment is contrary to the immigration laws.

IRCA was not the first immigration law to contain provisions intended to prevent unauthorized employment. The employment-related restrictions in 8 U.S.C. 1182(a)(14) and 1251(a)(1) were part of the 1952 Act. Nor should Congress's repeated reinforcement of those restrictions be ignored. Although IRCA did not narrow the scope of the Attorney General's authority under 8 U.S.C. 1252(a)(1) (*i.e.*, to prescribe bond conditions to further the policies of the immigration laws), it did make it clearer that one of those policies is the prevention of unauthorized employment. Since the Attorney General may prescribe bond conditions to further any of the policies of the immigration laws, any expansion of those policies by subsequent legislation would necessarily enlarge the purposes for which bond conditions may legitimately be imposed as well.[11]

4. Notwithstanding respondents' characterization of the Attorney General's position as "ludicrous," Resp. Br. 2 & n.1, 15 n.7, his interpretation of 8 U.S.C. 1252(a)(1) to authorize imposition of bond conditions against unauthorized employment is of long standing and merits substantial deference.

Respondents confuse the existence of statutory authority with its exercise. Although they are correct that the Attorney General did not frequently exercise his authority to impose a bond condition against unauthorized em-

[11] The submission of the International Human Rights Law Group —that persons have "the right to be free to seek and accept employment," Br. 7, under customary international law—is not presented in this case. In any event, such a right would impose a duty only on the alien's native country, not the United States. Amici does not identify *any* country allowing aliens to "seek and accept employment" regardless of their immigration status.

ployment before 1983, he has consistently maintained that he has such authority. *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 553-556 (A.G. 1974); see Gov't Br. 33-35. Respondents suggest that this interpretation is not long-standing because the Attorney General stated that a bond condition against unauthorized employment "would be appropriate only 'in some circumstances.'" Resp. Br. 15 (quoting *In re Toscano-Rivas*, 14 I. & N. Dec. at 553). In fact, the Attorney General said that such a condition could appropriately be imposed "in *at least* some circumstances." *In re Toscano-Rivas*, 14 I. & N. Dec. at 553 (emphasis added). The regulation reflects the Attorney General's conclusion that current circumstances make the bond condition an appropriate one today.[12]

5. Construing 8 U.S.C. 1252(a)(1) to authorize a bond condition against unauthorized employment raises no substantial question under the Fifth Amendment's Due Process Clause.

a. Respondents' due process claim is unfounded, but it could not support the lower courts' injunction even if it were correct. Respondents' constitutional challenge asserts that the agency's procedure is inadequate to ensure that the bond condition will be imposed only on aliens who are not authorized to work. In contrast, the permanent injunction rests on the conclusion that employment-related bond conditions exceed the Attorney Gen-

[12] Amici American Immigration Lawyers Association suggests that deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inappropriate because respondents challenge the Attorney General's regulation as being "ultra vires"—a challenge that is "fundamentally different from *Chevron*-type disagreements over the meaning of a substantive term." Br. 10. The proffered distinction is elusive if it exists at all. Any agency action challenged as being in violation of a statute can be characterized as "ultra vires." See *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment). In any event, the Court has frequently deferred to agencies' determination of matters that affect their own statutory jurisdiction. *Id.* at 381-382; *Dole* v. *United Steelworkers of America*, 110 S. Ct. 929, 944 (1990) (White, J., dissenting) (collecting cases).

eral's statutory authority regardless of how they are applied. As respondents recognize, the appropriate remedy for the absence of a pre-deprivation hearing is provision of a hearing, Resp. Br. 36, not invalidation of the regulation implementing the bond condition. Thus, even if respondents' due process claim were properly before the Court (and respondents concede that it is not, Resp. Br. 35 & n.21), and even if the Court were to accept that claim, the correct judgment would be to read the regulation together with the Due Process Clause and require the agency to provide such additional procedures as the Constitution might require.

b. The canon of statutory construction that presumes Congress intended to enact a constitutional statute is inapposite because the text of 8 U.S.C. 1252(a)(1) does not admit of a limiting construction that would exclude employment-related bond conditions. This Court has repeatedly warned that this interpretive canon is "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)); see *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964). Instead, it applies only when language is ambiguous and "a construction of the statute is *fairly possible* by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932) (emphasis added).

Section 1252(a)(1) authorizes "such conditions as the Attorney General may prescribe." As shown in point 2.a., *supra*, that language cannot fairly be read to limit permissible bond conditions to those related to the alien's appearance for hearings. Indeed, this Court rejected a closely-related argument in *Carlson* v. *Landon*, 342 U.S. at 538, 542, where it upheld the detention of alien communists on security grounds under the predecessor of Section 1252(a)(1). It dismissed as "not * * * of great significance" the "factor of probable availability for trial." *Id.* at 541 n.35. Respondents' constitutional claim cannot compel a narrow reading of 8 U.S.C. 1252(a)(1)

because there is no available construction that would avoid the constitutional question.

c. In any event, respondents' constitutional challenge is insubstantial. Respondents confuse two separate determinations made by the district director: (1) whether an alien is authorized to work (and thus whether the "no work" condition will be imposed in the alien's release bond); and (2) whether an alien has violated the "no work" condition. Respondents' constitutional arguments focus chiefly on the latter determination. Resp. Br. 36. In fact, there are fully adequate procedures available with respect to both.

The procedures governing the initial determination plainly satisfy the Due Process Clause. The alien has a liberty interest in accepting employment only if he has a status authorizing him to work. He has two levels of administrative review and three levels of judicial review to ensure the accuracy of that determination. 8 C.F.R. 3.1(b)(7) and 242.2(c)-(d); 8 U.S.C. 1329. The Immigration Judge may conduct bond hearings by telephone, and the regulation requires him to render his decision promptly. 8 C.F.R. 242.2(d); see point 1, *supra*. That directive is buttressed by a statutory right to habeas corpus relief if "the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." 8 U.S.C. 1252(a)(1). In light of the extensive administrative and judicial review already provided, and the fact that the decision is based on the alien's immigration status and readily-available documents, point 1, *supra*, the probable value of additional safeguards is nil. Additional safeguards such as formal predeprivation hearings, however, would impose an enormous fiscal and administrative burden since they would apply in more than 100,000 deportation proceedings each year.[13] The existing procedures are more than

[13] Immigration judges received 112,314 deportation cases in fiscal year 1990. Executive Office of Immigration Review, *Statistical Summary* n.p. (Nov. 1, 1990).

sufficient to survive respondents' facial challenge. Cf. *United States* v. *Salerno*, 481 U.S. at 751.[14]

The procedures by which the district director arrests and takes custody of an alien for working in violation of a bond condition also comply with the Due Process Clause. Although the alien has a liberty interest in remaining free of unnecessary restraint, the risk that he will be detained in error is small. The bond itself will say whether the alien may work, and the determination whether the alien is working does not seem an unusually difficult one to make. The district director does not have to make "a judgment call regarding the likely outcome of the person's pending deportation hearing." Resp. Br. 39.

Moreover, the district director's arrest warrant must be based on probable cause, *International Molders' & Allied Workers' Local Union No. 164* v. *Nelson*, 799 F.2d 547, 552 (9th Cir. 1986), and the alien may apply to an Immigration Judge "for release from custody," 8 C.F.R. 242.2(d), with the same prompt decision and rights to administrative and judicial review as are available in bond redetermination proceedings, *ibid.*; 8 C.F.R. 3.1(b)(7).[15] The alien may also challenge the district

[14] Respondents suggest that imposition of the "no work" condition is tantamount to detention because bondsmen will refuse to write bonds for aliens to whom the condition is applied. Resp. Br. 37 n.22, 39. Although respondents assert that this conclusion is established by "unrebutted evidence," *ibid.*, the affidavits of bail bondsmen to which they refer presuppose that violation of the bond condition will forfeit the bond. 12/16/83 Tr. 67. That is incorrect. "Where the 'no work' condition is violated, the appropriate response would be to take the alien into custody." 48 Fed. Reg. 51,142 (1983), Pet. App. 141a-142a.

[15] This Court has previously held that a post-detention probable cause hearing affords all the process that is due an arrestee in a criminal case. *Schall* v. *Martin*, 467 U.S. 253, 275 (1984); *Gerstein* v. *Pugh*, 420 U.S. 103, 125 (1975). Such detention does not constitute punishment for a past crime but, under this regulation, protection of society from "a continuing violation of the immigration laws." 48 Fed. Reg. 51,142 (1983), Pet. App. 139a; cf. *United States* v. *Salerno*, 481 U.S. at 747-748.

director's decision by filing a petition for a writ of habeas corpus in United States District Court. 8 U.S.C. 1252(a)(1); see *United States ex rel. Yaris* v. *Esperdy*, 202 F.2d 109, 112 (2d Cir. 1953) (bond revocation determination reviewable for abuse of discretion); see also *Rubinstein* v. *Brownell*, 206 F.2d 449, 453-454 n.14 (D.C. Cir. 1953) (following *Esperdy*); *Bartholomeu* v. *District Director, Immigration & Naturalization Service*, 487 F. Supp. 315, 321 (D. Md. 1980) (same). Since the district director's bond revocation determination is not complicated, and is subject to administrative and judicial review, the Constitution requires no additional safeguards. See *Abel* v. *United States*, 362 U.S. 217, 234 (1960) (intimating that INS arrest procedure is constitutional based on the "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation") (dictum).[16]

* * * * *

Respondents' quarrel is not with the process by which bond conditions are imposed, but with the substantive policy it enforces: that aliens may not work without au-

[16] Respondents' challenge to the procedure by which the district director determines that an alien has violated a "no work" bond condition is not properly before this Court. Respondents do not deny that aliens subject to the regulation can comply with the bond condition by refraining from working without authorization. Their procedural challenge therefore rests on the speculation that individual respondents will violate the bond condition. This Court has consistently denied Article III standing to plaintiffs who sought injunctive relief based on the assumption that "they anticipate violating lawful criminal statutes and being tried for their offenses." *O'Shea* v. *Littleton*, 414 U.S. 488, 496 (1974). "It was to be assumed that '[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983) (quoting *O'Shea* v. *Littleton*, 414 U.S. at 497). Respondents' constitutional challenge therefore presents no concrete case or controversy as required by Article III.

thorization. The policy choice between preserving scarce job opportunities for Americans and opening the labor market to others is admittedly a difficult one. But Congress has resolved it in favor of protecting domestic laborers. Those authorized to work in this country need those jobs as much as respondents do—and are legally entitled to them.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

APPENDIX

1. H.R. 10, as debated and passed by the House of Representatives on July 17, 1950 (96 Cong. Rec. 10,448-10,449), provided: That section 20 of the Immigration Act of February 5, 1917, as amended (39 Stat. 890; 57 Stat. 553; 8 U.S.C. 156), is hereby amended to read as follows:

> Section 20. (a) That the deportation of aliens provided for in this act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States; or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States; or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such an alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its ter-

ritory. If the United States is at war and the deportation, in accordance with the preceding provisions of this section, of any alien who is deportable under any law of the United States, shall be found by the Attorney General to be impracticable or inconvenient because of enemy occupation of the country whence such alien came or wherein is located the foreign port at which he embarked for the United States or because of other reasons connected with the war, such alien may, at the option of the Attorney General, be deported (1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country wherein is located that government in exile, if that country will permit him to enter its territory; or (2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then, to a country or any political or territorial subdivision thereof which is approximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country. If deportation proceedings are instituted at any time within 5 years after the entry of the alien, such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this act, and the deportation from such port shall be at the expense of the owner or owners of such

vessels or transportation lines by which such aliens respectively came, or, if that is not practicable, at the expense of the appropriation for the enforcement of this act. If deportation proceedings are instituted later than 5 years after the entry of the alien, or, if the deportation is made by reason of causes arising subsequent to entry, the cost thereof shall be payable from the appropriation for the enforcement of this act. A failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this act shall be punished by the imposition of the penalties prescribed in section 18 of this act: *Provided*, That when in the opinion of the Attorney General the mental or physical condition of such alien is such as to require personal care and attendance, the said Attorney General shall when necessary employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed. Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any

such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. When such an order of deportation has been made against any alien, the Attorney General shall have a period of 6 months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for surrender of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States has not been effected, within 6 months from the date of the order of deportation the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized hereinafter in this section.

(b) Any alien, against whom an order of deportation, heretofore or hereafter issued, has been outstanding for for [sic] than 6 months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Commissioner of Immigration and Naturalization, with the approval of the Attorney General. Such regulations shall require any alien subject to supervision (1) to appear from time

to time before an officer of the Immigration and Naturalization Service for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information whether or not related to the foregoing as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Commissioner of Immigration and Naturalization in his case. Any alien who is found by the Attorney General to have willfully failed to comply with such regulations, or to have willfully failed to appear or to give information or submit to medical or psychiatric examination if required, or to have knowingly given false information in relation to the requirements of such regulations, or to have knowingly violated a reasonable restriction imposed upon his conduct or activity, shall be thereafter detained in accordance with subsection (c) until such time as the Attorney General orders other disposition of the alien's case. Nothing in this subsection shall preclude the Attorney General at any time from directing removal of any alien of the classes described in subsection (c) from supervision under this subsection to detention as prescribed in subsection (c).

(c) Any alien who is deportable under (1) the Act of October 16, 1918, as amended (40 Stat. 1008, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596, 21 U.S.C. 171, 174-175);

the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U.S.C. 156a); (3) so much of section 19 of the Immigration Act of 1917, as amended (30 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, may, in the discretion of the Attorney General, be denied the privilege of release as provided in subsection (a) and instead the alien may be taken into custody and transported to such place of detention as may be designated by the Attorney General and there, or at any such other place or places as may thereafter be designated by the Attorney General, be detained, though not at hard labor, pending eventual deportation, or until departure from the United States otherwise shall have been arranged, or until the Attorney General, upon sufficient evidence of good cause, shall order supervision of the alien under subsection (b)." [sic] In determining whether good cause has been shown to justify releasing the alien and ordering his supervision under subsection (b), the Attorney General shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inabilitly [sic] of

the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(d) Any alien subject to detention under subsections (b) or (c) of this section may be released, in the discretion of the Attorney General, from detention under subsection (c) and placed under supervision under subsection (b), on a showing which shall satisfy the Attorney General that the alien has obtained a travel document or made other approved arrangements to leave the United States, and, if considered necessary, upon giving a departure bond conditioned as prescribed by the Attorney General, with good and sufficient sureties approved by the Attorney General. Should any alien return to the United States after having departed pursuant to this subsection and be excluded and his deportation following such exclusion be impracticable, or if he enters the United States unlawfully, he shall again be taken into custody and, regardless of the charges upon which he was deportable, shall be thereafter subject to treatment in accordance wtih [sic] subsection (c). In any such case, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens required by this section to be taken into custody and detained. Nothing in this section shall be construed so as to prevent any alien detained under subsection (c) of this section, from questioning, on petition

for writ of habeas corpus filed in the district court of the United States of the district wherein he is detained, the validity of such detention.

(e) Before the Attorney General may order the release under supervision of any alien detained under subsection (c), he shall prepare and file with all the other papers relating to such case, a synopsis of the evidence upon which such order is to be made, and the reasons for such order.

(f) If any alien subject to supervision or detention under subsections (b) and (c) of this section is able to depart from the United States, except that he is financially unable to pay his passage, the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this act, unless such payment is otherwise provided for under this act.

(g) No court shall have jurisdiction to release on bond or otherwise any alien detained under any provision of law relating to the exclusion or expulsion of aliens at any time prior to a decision of court in his favor which is not subject to further judicial reviews.

2. Section 23 of the Subversive Activities Control Act of 1950, Title I of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1010-1012, amended Section 20 of the Immigration Act of February 5, 1917, as follows:

Sec. 20. (a) That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified

by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States; or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States; or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such an alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory. If the United States is at war and the deportation, in accordance with the preceding provisions of this section, of any alien who is deportable under any law of the United States, shall be found by the Attorney General to be impracticable or inconvenient because of enemy occupation of the country whence such alien came or wherein is located the foreign port at which he embarked for the United States or because of other reasons connected with the war, such alien may, at the option of the Attorney General, be deported (1) if such alien is a citizen or subject of a country whose recognized government

is in exile, to the country wherein is located that government in exile, if that country will permit him to enter its territory; or (2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then, to a country or any political or territorial subdivision thereof which is approximate to the country of which the alien is a citizen or subject, or with the consent of the country of which the alien is a citizen or subject, to any other country. No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution. If deportation proceedings are instituted at any time within five years after the entry of the alien, such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessels or transportation lines by which such aliens respectively came, or, if that is not practicable, at the expense of the appropriation for the enforcement of this Act. If deportation proceedings are instituted later than five years after the entry of the alien, or, if the deportation is made by reason of causes arising subsequent to entry, the cost thereof shall be payable from the appropriation for the enforcement of this Act. A failure or refusal on the part of the masters, agents,

owners, or consignees of vessels to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this act shall be punished by the imposition of the penalties prescribed in section 18 of this Act: *Provided*, That when in the opinion of the Attorney General the mental or physical condition of such alien is such as to require personal care and attendance, the said Attorney General shall when necessary employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed. Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. When such an order of deportation has been made against any alien, the Attorney General shall have a period

of six months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for surrender of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States has not been effected, within six months from the date of the order of deportation the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized hereinafter in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain.

(b) Any alien, against whom an order of deportation, heretofore or hereafter issued, has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall require any alien subject to supervision (1) to appear from time to time before an officer of the Immigration and Naturalization Service for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information whether or not related to the foregoing as the Attorney General may deem fit and

proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

(c) Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596, 21 U.S.C. 171-175); (3) the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U.S.C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his

departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(d) Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance.

(e) If any alien subject to this section is able to depart from the United States, except that he is financially unable to pay his passage, the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this Act, unless such payment is otherwise provided for under this Act.

3. Section 242(a) of the Immigration and Nationality Act of 1952, ch. 477, tit. II, 66 Stat. 208-209 (codified as amended at 8 U.S.C. 1252(a)(1)) provides:

> Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter au-

thorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

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